

**IN THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF ALABAMA  
EASTERN DIVISION**

<b>TYLER'S, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>CIVIL ACTION NO.:</b>
	)	
<b>TRAVELERS PROPERTY CASUALTY</b>	)	<b>3:06cv815-VPM</b>
<b>COMPANY OF AMERICA, and A through</b>	)	
<b>Z who are fictitious parties to be named at a</b>	)	
<b>later date when their identities become known,</b>	)	
	)	
<b>Defendants.</b>	)	

**DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S  
OBJECTION TO REMAND AND PLAINTIFF'S STIPULATION  
TO AMEND AND/OR SET OFF**

COMES NOW the Defendant, Travelers Property Casualty Company of America ("Travelers"), by and through counsel, and in reply to the Plaintiff's Response to this Defendant's Objection to Remand and Stipulation to Amend and/or Set Off, does say and show unto the Court as follows, to-wit:

1. Plaintiff has attempted to point to the original Complaint filed in Lee County, Alabama, for its position that a specified claim for damages was made in the amount of \$74,999.00 and no more. While the Plaintiff's *ad damnum* clause throughout the original Complaint states a claim for \$74,999.00, it is clear from the body of the Complaint, that the true amount in controversy exceeds the jurisdictional amount of this Court. Specifically in paragraphs three through five of Count One, , Plaintiff makes the following claims:

3. On or about the 21<sup>st</sup> day of July, 2004. Plaintiff discovered

his employee, Ms. Jerri M. Floyd, had stolen/embezzled significant amounts from the Plaintiff in excess of \$120,000.00.

4. Plaintiff timely gave Defendants notice of said loss under said policy, and made a claim for benefits thereunder.
5. Defendants have refused to pay said claim or reasonably act on said claim.

2. Plaintiff has attempted to stipulate in the Response to the Defendant's Objection to Remand and Stipulation to Amend or Set Off, that the Plaintiff, in the event that this matter is remanded back to Lee County Circuit Court, will agree to amend the Complaint and stipulate to a set off against any verdict and that no judgment would be entered for an amount greater than \$74,999.00. This Defendant respectfully submits that this proposed amendment to the Complaint and agreement or stipulation to amend or set off should be of no consequence to this Court in respect to this particular case and the Defendant's objection to remand.

3. This case is unique in that it is founded upon a contract claim made by the Plaintiff on an insurance policy issued to the Plaintiff by Travelers Property Casualty Company of America. The Plaintiff has specifically made claim for breach of the insurance contract, bad faith denial of an insurance claim, fraud, misrepresentation and conversion.

4. Attached hereto is the Property Loss Notice submitted to Travelers by the Plaintiff as of July 22, 2004, indicating a theft of money totaling about \$100,448.00. from the Plaintiff. (Exhibit "A" to the Affidavit of John Tomme, which is attached hereto as Exhibit "1"). Also, attached hereto as Exhibit "B" to Tomme's Affidavit is correspondence to Travelers from the Plaintiff's counsel dated November 23, 2005, which was received by Travelers prior to the filing of this lawsuit. The letter establishes that the claim being made by the Plaintiff under its contract of

insurance is "near or about \$120,000.00." [Affidavit of John Tomme (Exhibit "1") and Exhibit "B" thereto].

5. The Defendant respectfully submits to the Court that this case is factually distinguishable from other cases recently decided in this Court, to-wit, *Thornton v. Waffle House, Inc.*, 2006 WL 2631350 (M.D. Ala., Sept. 13, 2006) and *Hall v. CSX Transportation*, 2006 WL 3313682 (M.D. Ala., Nov. 14, 2006) in that this is an action on contract and is a claim made for a sum certain as evidenced by the property loss notice.

6. In both *Hall v. CSX* (a personal injury case arising from an auto accident) and *Thornton v. Waffle House, Inc.*, (assault and battery/personal injury), plaintiff's claims were for personal injuries and sought unspecified amounts of damages. The Court in granting the Motions to Remand in those cases accepted stipulations by the Plaintiffs that the claims being asserted would not exceed the jurisdictional amount of the Court and accepted the post removal affidavits and stipulations of the plaintiffs and plaintiffs' counsel as only clarifying the amount in controversy at the time of the filing of the Complaint and at the time of the Petition for Removal.

7. The Defendant respectfully submits that the contract claim of Plaintiff is distinguishable from both *Hall* and *Thornton* in that the present claim is a contract claim made on a policy of insurance for employee theft. The proof of loss heretofore submitted by the Plaintiff on July 22, 2004, and then clarified by letter to the Defendant by Plaintiff's counsel, clearly establishes that the contract claim alone without any consideration of Plaintiff's claim for punitive damages is for an amount in excess of the jurisdictional amount of this Court.

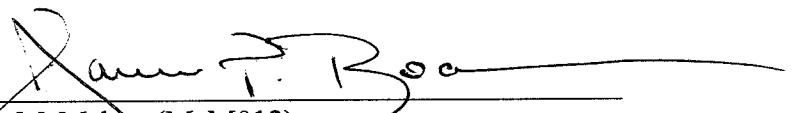
8. Since the Plaintiff's claim as submitted to the Defendant is for well over \$100,000.00 and the Plaintiff's Complaint asserts not only the Defendant's breach of an insurance contract

(compensatory damages for a sum certain), but also the Defendant's bad faith (the basis for Plaintiff's punitive damages claims), the Plaintiff should not be allowed to limit this Court's jurisdiction by merely stating that they will not seek more than \$75,000.00 exclusive of interest and costs should the case be remanded.

9. These Defendants respectfully submit that since this is a contract action wherein the damages claimed by the Plaintiff in the proof of loss filed in 2004 clearly establishes an amount in controversy in excess of this Court's jurisdictional amount, as opposed to a personal injury claim where the damages are not "liquidated," that the Plaintiff cannot limit this Court's jurisdiction by attempting to enter into a post-removal stipulation after the proper removal of the initial Complaint.

10. This Defendant respectfully submits that it has more than met its burden of proof in showing that the Plaintiff's claim, if successful, will exceed the jurisdictional amount of this Court.

Respectfully submitted,

  
Ann McMahan (McM012)  
James P. Rea (REA 004)  
Attorney for Defendant  
Travelers Property Casualty Company of America

**OF COUNSEL:**

DOMINICK, FLETCHER, YEILDING,  
WOOD & LLOYD, P.A.  
2121 Highland Avenue South  
Birmingham, Alabama 35205  
(205) 939-0033

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been served upon the following listed persons by placing a copy of the same in the United States mail, first-class postage prepaid and properly addressed as follows:

Ben C. Hand, Esquire  
Michael C. Fellows, Esquire  
HAND, FELLOWS & ASSOCIATES  
114 N 8<sup>th</sup> Street  
Opelika, Alabama 36801

on this the 7<sup>TH</sup> day of December, 2006.



OF COUNSEL

**IN THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF ALABAMA  
EASTERN DIVISION**

**TYLER'S, INC.,  
Plaintiff,**

**vs.**

**TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA, and A through  
Z who are fictitious parties to be named at a  
later date when their identities become known,**

**Defendants.**

**CIVIL ACTION NO.:**

**3:06 CV-815-VPM**

**AFFIDAVIT OF JOHN TOMME**

COUNTY OF FULTON     )  
STATE OF GEORGIA     )

Before me, the undersigned authority, Notary Public, in said County and State, personally appeared John Tomme who is over the age of nineteen, of sound mind, who is known to me, attests to have personal knowledge of the matters attested to below, is competent to testify to the same, and who, being by me first duly sworn, does hereby depose and say as follows:

1. My name is John Tomme, and I am an adult resident citizen of Georgia. I am employed as a Technical Claims Specialist by Travelers Property Casualty Company of America (hereinafter "Travelers").

2. I make this affidavit based upon my own personal knowledge of the facts contained herein and upon my review of the business records of Travelers. The attached documents are kept in the course of the regularly conducted business of Travelers, and it was the regular practice of Travelers and its employees to retain in its business records the documents attached hereto as

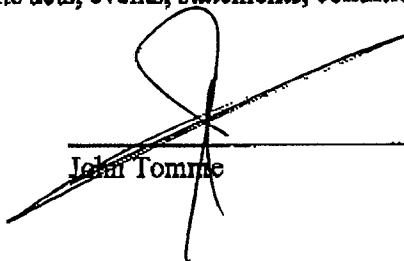


Exhibits "A" and "B." The attached documents reflect acts, events, conditions or statements submitted and made by representatives of the insured, Tyler's Inc., at or near the time reflected on the documents.

3. Attached to my Affidavit as Exhibit "A" is the Acord Property Loss Notice submitted by Tyler's Restaurants, Inc., to J. Smith Lanier & Co. of Opelika on or about July 22, 2004. The Acord form and the attached newspaper article were faxed to me on July 22, 2004. Attached to my Affidavit as Exhibit "B" is a letter dated November 23, 2005, that I received from the office of counsel representing Tyler's Restaurants, Inc., regarding Tyler's claim.

4. I certify that the attached documents are included in the claim file for Tyler's, Inc., that was maintained under my custody and control.

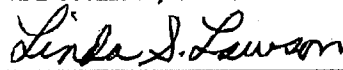
5. These records were kept in the regular course of business by employees of Defendant Travelers with personal knowledge of the acts, events, statements, conditions, etc. who created the business records.

  
\_\_\_\_\_  
John Tomme

STATE OF GEORGIA     )  
FULTON COUNTY        )

Before me, a Notary Public in and for said County and said State, personally appeared JOHN TOMME, who, being known to me states that he has read the above and foregoing and that the information is correct to the best of his knowledge, information, and belief.

Sworn to and subscribed before me this the 14<sup>th</sup> day of December, 2006.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:

~~Notary Public, Gwinnett County, Georgia~~  
My Commission Expires August 18, 2009

62TYLERSREST

<b>ACORD. PROPERTY LOSS NOTICE</b>						TBD		DATE 07/22/04	
PRODUCER PHONE (A/C, No, Ext): 334 749-3401		MISCELLANEOUS INFO (Site & location code)		DATE OF LOSS AND TIME 07/21/04		AM PM		PREVIOUSLY REPORTED YES <input checked="" type="checkbox"/> NO	
J Smith Lanier & Co of Opelika P. O. BOX 828 Opelika, AL 36803		POLICY TYPE		COMPANY AND POLICY NUMBER		NAIC CODE		POLICY DATES	
		PROP/ HOME		CO: Travelers/Business OW				EFF: 04/13/04	
		FLOOD		POL: I680214Y3049TIL04				EXP: 04/13/05	
		WIND		CO:				EFF:	
CODE:		SUB CODE:		POL:				EXP:	
AGENCY CUSTOMER ID 52064									
INSURED				CONTACT		CONTACT INSURED			
NAME AND ADDRESS OF INSURED Tyler's Restaurants, Inc. P O Box 2567 Opelika, AL 36803		DATE OF BIRTH		NAME AND ADDRESS OF INSURED Brad					
RESIDENCE PHONE (A/C, No) 334 749-3428		BUSINESS PHONE (A/C, No, Ext)							
NAME AND ADDRESS OF SPOUSE (IF APPLICABLE)		DATE OF BIRTH		RESIDENCE PHONE (A/C, No)		BUSINESS PHONE (A/C, No, Ext)			
		SOC SEC # OR FEIN:		WHERE TO CONTACT		WHEN TO CONTACT			
<b>LOSS</b>									
LOCATION OF LOSS 109 S 8th Street Opelika, AL, 36801				POLICE OR FIRE DEPT TO WHICH REPORTED					
KIND OF LOSS X THEFT		FIRE		LIGHTNING		FLOOD		OTHER (explain)	
		HAIL		WIND				PROBABLE AMOUNT ENTIRE LOSS	
DESCRIPTION OF LOSS & DAMAGE (Use separate sheet, if necessary) Theft of about \$100,448 from 1998 to June 2004. Please see attached news article. Policy coverage should go back to the 1998 policy as well.									
<b>POLICY INFORMATION</b>									
MORTGAGEE <input type="checkbox"/> NO MORTGAGEE									
HOMEOWNER POLICIES SECTION 1 ONLY (Complete for coverages A, B, C, D & additional coverages. For Homeowners Section II Liability Losses, use ACORD 3.)									
A. DWELLING		B. OTHER STRUCTURES		C. PERSONAL PROPERTY		D. LOSS OF USE		DEDUCTIBLES	
								DESCRIBE ADDITIONAL COVERAGES PROVIDED	
								ON	
COVERAGE A. EXCLUDES WIND									
SUBJECT TO FORMS (Insert form numbers and edition dates, special deductibles)									
FIRE, ALLIED LINES & MULTI-PERIL POLICIES (Complete only those items involved in loss)									
ITEM	SUBJECT OF INSURANCE		AMOUNT	% COINS	DEDUCTIBLE	COVERAGE AND/OR DESCRIPTION OF PROPERTY INSURED			
1	X	BLDG	5,000		500	Spoilage			
2	X	BLDG	5,000		500	COL: Spoilage Breakdown			
3	X	BLDG				Protective Safeguard P-9 applies			
SUBJECT TO FORMS (Insert form numbers and edition dates, special deductibles)									
FLOOD POLICY	BUILDING	DEDUCTIBLE	ZONE	PRE FIRM	DIFF IN ELEV	FORM TYPE	GENERAL	CONDO	
	CONTENTS	DEDUCTIBLE		POST FIRM					
WIND POLICY	BUILDING	DEDUCTIBLE	ZONE	FORM TYPE	GENERAL	CONDO			
	CONTENTS				DWELLING				
REMARKS/OTHER INSURANCE (List companies, policy numbers, coverages & policy amounts) ONLY: PREVIOUS ADDRESS OF INSURED & WIFE'S MAIL									
* Continued from Fire, Allied Lines Section *									
(See Attached Remarks Information.)									
CAT #	FICO #	ADJUSTER ASSIGNED		ADJUSTER #		DATE ASSIGNED			
REPORTED BY Insured		REPORTED TO Cindy Terry		SIGNATURE OF INSURED		SIGNATURE OF PRODUCER			

ACORD 1 (2001/02) 1 of 3 #3477 NOTE: IMPORTANT STATE INFORMATION ON REVERSE SIDE CYT © ACORD CORPORATION 1998



**REMARKS (Continued from page 1)**

Coverage: restaurant pac applies

Coverage: Personal Property Amount: 38,246 Ded: 500 Cause of Loss: Special  
(Including Theft) Valuation: Replacement Cost

\* Additional/Other Interests Continued \*

Interest Name: Charter Bank; Loan Servicing Department Interest Address: P.O.  
Box 570 West Point GA 31833 Interest Nature: Mortgage Interest Number: 1

Interest Name: First Leasing Interest Address: 1311 1st Avenue; Opelika AL  
36801 Interest Nature: Loss Payee Interest Number: 2

Interest Name: R. A. Goodson & Doug Horn Interest Address: PO Box 2567;  
Opelika AL 36803 Interest Nature: Additional Insured Interest Number: 5

WEDNESDAY, JULY 21, 2004

**IN OUR AREA****metery to get new office building**

ing were to relocate off-site. at meetings, the council dis- moving cemetery operations to sites such as City Hall, but ncil members were opposed a.

a. member William Lazenby office should serve multiple such as keeping employees visitors and for the public to er in bad weather.

creating a snag for the public th when coming to City Hall a plot," Council member Harris said.

uvenhuise said the depart- been working hard to get the to build the new office and ed with the council's deci-

All of the city's cemeteries are locat- ed in Ward 1 represented by council member Patsy Jones, who said she has received numerous complaints on the cemetery from the residents of the city.

"I am personally offended that we have come nine years saying that we want to do something," she said, adding that expertise of the employees working in the day-to-day operations should be taken into regard.

Tuesday was also the last day for candidates to qualify for the Aug. 24 city elections. A resolution was passed deeming the unopposed candi- dates to be elected. They are City Council candidates Eddie Smith, Ward 4; Jerry Teel, Ward 3; Clarence Harris, Ward 2 and William Lazenby, Ward 5. There are no write-ins in mu-

nicipal elections.

In other business the council:

■ Passed a resolution to accept the donation of the Brown Center that is owned by the Opelika Board of Educa- tion.

■ Passed a resolution to contract with Barge Waggoner Sumner & Can- non Inc. for the design plans for the Opelika Recreation Center.

■ Passed a resolution authorizing the disposal of certain personal prop- erty of the city that is no longer needed.

■ Passed a resolution to ratify amendments to the City Comprehen- sive Plan.

■ Awarded a bid of \$4,620 to Bagby Elevator Co. for the elevator mainte- nance in City Hall, the library and the police department.

germent. ed from an opened on at, south of July 10 at

St. Jerry was iden- tal people in the inci- vere fired es.

ter, one of ken down

on the side of the road when another vehicle drove up to it and stopped. The people in the two vehicles, both with Ma- con County plates, started shooting at each other, Holder said.

"The investigation pieced together enough to identify (Nestor) as one of the ones involved," Holder said. "Addi- tional warrants are pending."

A pistol, shotguns and as- sault rifles were found at the

scene of the incident, Holder said.

No one was injured in the incident.

Police do not yet have a mo- tive, but the investigation is ongoing.

**Opelika police investigate theft at Tyler's Restaurant**

Opelika police are investi- gating a theft at Tyler's Restaurant on South Eighth

Street in Opelika. From 1998 to June 2004, about \$100,448 was stolen from the restau- rant, according to Opelika po- lice Capt. Melvin Harrison.

"It appears to be internal," he said. Although there has been no arrest, Harrison said there is a suspect.

Attempts to reach a manag- er at Tyler's Restaurant were unsuccessful.

STAFF REPORTS

Monday at a ad after six time be-

ted Monday e Street after es were tak- nd 3 a.m.

ted Monday

■ Theft of property was reported Friday at a home on South Long Street after a li- cense plate was taken sometime between April 15 and July 6

■ Theft of property was reported Friday at a home on Dale Avenue after a safe and cash were taken sometime between 5 p.m. July 14 and 9 p.m. Friday

■ Burglary was reported Saturday at an

ningham Drive after a window was dam- aged sometime between 4 p.m. Friday and 5:10 a.m. Monday

■ Theft of property was reported Monday at a business on Cunningham Drive after cash was taken and a vending machine was damaged sometime between 4 p.m. Friday and 5:10 a.m. Monday

■ Theft of property was reported Monday at a business on Cunningham Drive after

were reported Monday at a business on Centerhill Drive after cash was taken and a vending machine was damaged some- time between 3 p.m. Saturday and 11 a.m. Monday.

■ Theft of property was reported Monday at a business on Pepperell Parkway after cash was taken sometime between 8 and 10 a.m.

■ Burglary and theft of property were re-

HAND, FELLOWS & ASSOCIATES  
A Limited Liability Company



ATTORNEYS AT LAW  
114 NORTH 8<sup>TH</sup> STREET  
OPELIKA, ALABAMA 36801  
PHONE: (334) 741-4077 FAX: (334) 741-4074  
November 23, 2005

Travelers Insurance Company  
Attn: John Tomme, Claims Adjuster  
C.S. #1817  
Alpharetta, GA 30023-1817

RE:	Insured:	Tyler's Restaurants, Inc.
	Claim Number:	ADX2074J
	Date Loss Discovered:	June 21, 2004
	Policy:	680- 214Y3049
	Type of Loss:	Employee Dishonesty
	Principal:	Jerri Floyd
	Date Coverage Began:	April 13, 1997
	Employment End Date:	June 28, 2004

Dear Mr. Tomme:

After reading your letter of November 24, 2004 we want to clarify a misunderstanding you may have so that your records may be accurate.

Our records show that this employee converted near or about \$120,000.000. It was not in 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002 or 2003 but in 2004 that our client made the discovery. In 2004, upon discovering this employee's ten year record of thievery, Mr. Bowling filed a police report and thereafter you were notified of such.

I know you are going to do the right thing here and not force us to take this matter before the courts. We look forward to speaking to you soon and if you should need additional information, please feel free to call. You may also contact Katrina Nunn in our office with any of your questions.

Sending you my warmest regards and with every good wish, I am

Very sincerely,

Eric J. Cox, Law Clerk to  
Ben C. Hand  
Attorney at Law  
HAND, FELLOWS & ASSOCIATES LLC  
114 North 8<sup>th</sup> Street  
Opelika, Alabama 36801



2005 DEC 12 AM 8:43